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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20546

FILE: B-206923

DATE: September 20, 1982

MATTER OF: T.G.L. Rubber Company, Ltd.

DIGEST:

1. Contracting agency properly rejected bid of Defense Cooperation Country source as non-responsive where solicitation required product to be listed, or eligible for listing, on appropriate qualified products list (QPL) and agency concluded that service testing of protester's product by Defense Cooperation Country's Ministry of Defense could not be accepted in lieu of established QPL testing procedures.
2. Contracting agency's plan to use first article testing for future procurements has no bearing on present procurement where QPL requirement was material and protester failed to meet this requirement.

T.G.L. Rubber Company, Ltd. (T.G.L.), protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DAAE07-81-B-B646, issued by the United States Army Tank-Automotive Command (Army), Warren, Michigan.

The IFB solicited bids for 10,111 solid rubber roadwheels which had to be manufactured in accordance with technical data package listing No. 7013976, dated May 8, 1981, and qualified products list (QPL) 3100-9, dated October 15, 1974. T.G.L. was the apparent low bidder, but the Army rejected the T.G.L. bid as non-responsive on the grounds that it did not meet the solicitation's QPL requirement. T.G.L. argues that, as a qualified source in Israel, and in view of Israel's status as a Defense Cooperation Country, its bid should not have been rejected.

We find no basis to question the Army's decision to reject T.G.L.'s bid.

Section "K," paragraph 12, of the IFB provides in pertinent part:

"Awards for any end items which are required to be Qualified Products will be made only when such items have been tested and are qualified for inclusion in a Qualified Products List identified below (whether or not actually included in the list) at the time set for opening of bids, or the time of award in the case of negotiated contracts. Offerors shall contact the office designated below to arrange to have products which they intend to offer tested for qualification."
(Emphasis added.)

While T.G.L., an Israeli firm, was not listed on the specified QPL, its product had been tested and accepted by the Israel Ministry of Defense. With its bid, T.G.L. included a letter from the Israel Ministry of Defense which states that T.G.L. is a qualified supplier of solid rubber roadwheels for the Ministry of Defense.

After opening T.G.L.'s bid and learning that T.G.L. was not on the QPL, the Army requested that T.G.L. supply for its review the test reports and other data which T.G.L. had originally submitted to the Ministry of Defense to obtain qualification of its product. The Army's technical personnel reviewed the information supplied and concluded that T.G.L.'s product was not eligible for inclusion on the QPL. Consequently, the Army notified T.G.L. by letter that its bid was rejected as nonresponsive because it did not offer a qualified product. Award was then made to the second low bidder, Firestone Defense Research & Products, a Division of Firestone Tire & Rubber Company.

In its protest to our Office, T.G.L. argues that its bid should not have been rejected. According to T.G.L., its product does in fact satisfy the QPL requirement because: (1) it has been approved by the Israel Ministry of Defense in accordance with the appropriate military specification; (2) Israel is a Defense Cooperation Country under Defense Acquisition Regulation (DAR) § 6-1500, et seq. (1976 ed.); and (3) under DAR §§ 6-1403.1(a) and 6-1502.1, a Defense Cooperation Country Source may compete for Federal procurements and, as was possible here, have the Defense

Cooperation Country's testing and qualification results accepted by the contracting agency, except that the contracting agency could, if deemed necessary, conduct confirmatory testing. In T.G.L.'s opinion, the Army did not comply with these regulations. T.G.L. believes that the Army should have accepted the findings of the Israel Ministry of Defense, but, since it did not, the Army should have then given T.G.L. adequate notice of the need for further testing, as well as sufficient time before bid opening to complete the qualification process. In this connection, T.G.L. criticizes the Army for not telling it immediately after bid opening that its bid was rejected, but instead giving all indications that the T.G.L. bid was being evaluated for the award. T.G.L. also appears to question the importance of the QPL process in this case since the Army's notice of rejection stated that future acquisitions of solid rubber roadwheels will be under a new specification and technical data package which will not utilize the QPL, but will require first article testing instead.

Despite a certain amount of confusion in their submissions, both parties appear to agree that, as a Defense Cooperation Country Source, T.G.L. was eligible to participate in the procurement and, also, that T.G.L. had to comply with the applicable Federal procurement laws and regulations like any other bidder. The key issue, then, is whether T.G.L. can be considered to have satisfied the solicitation's QPL requirement.

At the outset, we note that the purpose of the QPL system is to allow the efficient procurement of those types of products which require substantial testing in order to insure their compliance with specification requirements. Consequently, the QPL system is intended to be used prior to and independent of any specific procurement action as a means of determining whether there are products available which will meet the agency's specification requirements. The actual qualification process requires that the product be tested first for compliance with the specifications and, then, if found in compliance, to be identified on a list of qualified products. Davlynne, Inc., B-195962, October 31, 1979, 79-2 CPD 311; see also DAR § 1-1101(a).

We have held that, when an IFB requires a qualified product, a bid that offers equipment which has not been tested and approved for listing on the appropriate QPL prior to bid opening is not responsive to a material requirement and should be rejected. Wirt Inflatable Specialists, Inc., B-204673, December 31, 1981, 81-2 CPD 523. Moreover, the IFB, here, specifically warned potential bidders that their products had to be qualified prior to bid opening.

Based on the foregoing, it is clear that T.G.L., like any other bidder under this procurement, had to offer a fully qualified product at the time of bid opening or face rejection of its bid as nonresponsive. T.G.L. has complained that it was not properly notified of the QPL requirement or that it could have requested an extension of the bid opening date for the purpose of obtaining additional time to complete the qualification process. In addition, T.G.L. claims that, prior to bid opening, it notified the contracting officer of its willingness to undertake any type of testing, but never received a reply. T.G.L. also notes that had it known of the QPL requirement, it could have tried to make arrangements with the United States Air Force Quality Assurance representative stationed in Israel either to perform the testing or to arrange for the testing.

As mentioned above, section "X," paragraph 12, of the IFB specifically notified potential bidders of the procurement's QPL requirement. Contrary to T.G.L.'s apparent belief, the Army was not required to go into any greater detail. Paragraph 12 placed T.G.L. on notice of the requirement, and it was then T.G.L.'s responsibility to insure that it met that requirement. Although T.G.L. claims to have contacted the Army prior to bid opening, the contracting officer denies any inquiry was made. We have held that a protester does not meet its burden of affirmatively proving its case where, as here, the only available evidence is the conflicting statements of the protester and the contracting agency. Del Rio Flying Service, Inc., B-197448, August 6, 1980, 80-2 CPD 92. Therefore, we find that T.G.L. was on adequate notice of the QPL requirement and that there is no evidence that the Army misled the firm or otherwise treated T.G.L. unfairly. Moreover, the Army states that the use of the services of the United States Air Force Quality Assurance representative in Israel is not procedurally the same as meeting the QPL requirement.

DAR § 6-1502.1 states that Defense Cooperation Country Sources such as T.G.L., shall be solicited for Federal procurements the same as sources, from participating countries--members of the North Atlantic Treaty Organization that have entered into Memoranda of Understanding with the United States--and makes reference to DAR § 6-1403.1(a). This section of the regulation sets out the procedures for soliciting offers from participating country sources. Subsection 6-1403.1(a)(6) provides:

"Participating country sources shall not be automatically excluded from submitting offers because their supplies have not been tested and evaluated by a Department. Departments which find it necessary to limit solicitations to sources whose items have been service tested and evaluated by the department shall make provision for considering supplies from participating country sources which have been tested and accepted by the participating country for service use, subject to U.S. confirmatory test if necessary. Where it appears that these provisions might adversely delay service programs, the concurrence of the Department of Defense Acquisition Executive, OUSD (Research and Engineering), shall be obtained prior to exclusion of the participating country item from consideration. Sufficiency of participating country service testing should be considered on a case-by-case basis. When confirmatory tests of participating country end products are deemed necessary by the department, U.S. test and evaluation standards, policies, and procedures shall apply."

As indicated above, T.G.L. was not listed on the QPL or eligible to be listed. However, in view of DAR § 6-1403.1(a)(6), this fact alone did not require rejection of its bid. Since T.G.L.'s roadwheels had been tested and accepted for service use by the Israel Ministry of Defense, the Army was required under DAR § 6-1403.1(a)(6) to determine whether this Israeli testing satisfied the solicitation's QPL requirement.

In addition, the Army states that even had T.G.L. requested a delay in the bid opening to permit the QPL testing, this request would have been denied. The testing for inclusion on the QPL takes a minimum of 6 months. In August 1981, 3 months before the solicitation was issued, the Materiel Management Directorate indicted in a Determination and Findings that any delay in the projected delivery schedule under the solicitation would place the Army in an out-of-stock position for the items. Therefore, as noted by DAR § 6-1403.1(a)(6), where these provisions might adversely delay service programs, participating country items may be excluded.

T.G.L. has complained about the amount of time that elapsed between bid opening and the date it received notification that its bid was rejected. T.G.L. indicates that the Army was somehow negligent since that time could have been used for qualification of the T.G.L. product. However, it is clear from the record presented that the Army had not tried to delay matters, but instead had used the time in question to determine whether the testing performed by the Israel Ministry of Defense satisfied the solicitation's QPL requirement. This is apparent by the fact that, shortly after bid opening, the Army requested, and later received, the test reports and other data which T.G.L. had submitted to the Ministry of Defense to obtain qualification of its roadwheel. It was only after it had reviewed this material that the Army notified T.G.L. that its bid was rejected as nonresponsive. In that letter, the Army explained that, under the established procedures for qualifying products, the data T.G.L. submitted was inadequate and implied that, since bids had already been opened, no new tests could now be conducted or considered for purposes of the present solicitation.

Based on the foregoing, we find that the Army complied with DAR § 6-1403.1(a)(6). Upon discovering that T.G.L.'s product was neither listed on the QPL nor currently eligible to be listed, the Army did not immediately reject T.G.L.'s bid as required by the general rule, but reviewed the Israeli service testing to determine whether it would be the equivalent of the normal QPL testing process. The Army concluded that it was not, and it was only at that point that the Army notified T.G.L. that its bid was rejected. Since we have recognized that contracting agencies have considerable discretion in the establishment of testing procedures as well as evaluating the test results, in the absence of any showing by T.G.L. that the Army's finding was without a reasonable basis, we will not substitute our judgment for that of the procuring agency. See Embassy House, Inc., B-197854, July 7, 1980, 80-2 CPD 15; Charles J. Dispenza & Associates, B-183131, April 16, 1975, 75-1 CPD 229.

DAR § 6-1502.2 states that Defense Cooperation Country Sources, such as T.G.L., must be responsive to the terms and conditions of Department of Defense solicitations. As noted above, the IFB required bidders to offer only qualified products. Although it was possible under DAR § 6-1403.1(a)(6) for the testing done for the Israel Ministry of Defense to be accepted in lieu of standard QPL testing, once the Army concluded

that the Israeli services testing was not acceptable, the agency properly rejected T.G.L.'s bid as nonresponsive. Wirt Inflatable Specialists, Inc., supra.

Finally, we find no merit to T.G.L.'s argument that the QPL requirement should be considered unimportant in view of the Army's plan to use a new specification and first article testing for future procurements. The critical point is that the Army properly included a QPL requirement in the IFB, this requirement was material, and T.G.L. failed to meet this material requirement. How the Army plans to meet its needs in the future has no bearing on the present procurement.

We deny the protest.

Harry W. Lien Clarke
Comptroller General
of the United States